

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2703 OF 2006

IL & FS Investment Managers
Limited. .. Petitioner
v/s.
The Income-tax Officers & ors. .. Respondents
Mr.J.D. Mistri with Mr.Rajesh Shah for petitioner.
Mr.R.K.Sharma for respondents.

**CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.**

DATE OF RESERVATION OF ORDER : 21st November 2006

DATE OF PRONOUNCEMENT OF ORDER: 27th November 2006

ORDER : (Per H.L. Gokhale, J.)

1. The petitioner herein is an Asset Management Company which claims to manage private institutional funds of Indian and foreign investors for investments in India. The petitioner entered into an Agreement dated 12th April 2002 with its sister Concern named Infrastructure Leasing & Financial Services Limited ("IL & FS" for short), by which it agreed to purchase the business of managing private equity funds and venture capital funds and providing financial services for a lumpsum consideration of Rs.14.15 Crores. Under the said Agreement, it purchased various intangible assets of IL & FS such as intellectual property,

including but not limited to know-how, copyrights, computer software, technical data, franchises etc. Later-on the consideration payable was reduced to Rs.11.50 Crores by a subsequent Agreement.

2. The petitioner filed a return of its income for the Assessment Year 2003-04 wherein it claimed depreciation of Rs.3,05,77,001/-. The petitioner later-on received an intimation dated 28th February 2004 under Section 143(1)(a) of the Income Tax Act, 1961 ("the said Act" for short), by which the said return was accepted. Thereafter, the petitioner received a Notice dated 7th October 2004 under Section 143(2) of the said Act. It was followed by a hearing. The petitioner furnished all the required details and an order came to be passed by the 1st respondent - Income-tax Officer on 2nd March 2005 under Section 143(3) of the said Act finalizing the assessment, which included the claim for depreciation as mentioned above.

3. The petitioner was thereafter informed by the 1st respondent that there was an audit objection to a substantial portion of the depreciation amounting to Rs.2,82,74,878/- which was claimed on the intangible assets. The

petitioner explained its position by filing a reply and by pointing out that the said intangible assets were covered under Explanation 3 to Section 32(1) of the said Act.

4. It, however, so happened that the 1st respondent issued a Notice dated 2nd March 2006 under Section 148 of the said Act in which he claimed that he had reason to believe that the petitioner's income chargeable to tax for the said Assessment Year 2003-04 had escaped assessment. The petitioner filed a reply and pointed out that the return which had already been filed be treated as the income in response to the Notice under Section 148 of the said Act. The petitioner also sought the reasons for reopening the assessment. The 1st respondent forwarded the reasons by his letter dated 17th August 2006. These reasons are as follows:-

" The assessment in this case has been completed u/s. 143(3) on 2/3/2005 determining income at Rs.5,00,72,570/- . The company has purchased asset management rights costing Rs.11.31 crores from IL&FS Ltd., a company covered u/s.40A(2)(b) and treated this as intangible assets and

claimed depreciation @ 25% being Rs.2.83 crores for the year which has been wrongly allowed. By purchasing this right, the company has purchased a future right to receive income. Though it is an asset, but this intangible asset will not qualify for depreciation. In view of this, I have reason to believe that income of Rs.2.83 crores chargeable to tax has escaped assessment for A.Y. 2003-04.

The case is put up for kind approval of Addl. CIT Range-10(1) Mumbai. For sanction for issue of notice u/s. 148 of the I.T. Act, 1961.

I.T.O. 10(1)(2), Mumbai."

5. The petitioner filed its objections and pointed out that the petitioner had not only made a full and true disclosure but that the 1st respondent had arrived at the correct decision earlier by applying his mind and there was no reason to reopen the assessment. It was submitted that it amounted to a change of opinion which was not permissible. The 1st respondent, however, proceeded to reject the objections raised by the petitioner by letter dated 6th October 2006. The present Petition seeks to challenge the reopening

of this assessment by Notice dated 2nd March 2006, the Notice dated 6th June 2006 issued under Section 142(1) and the letter dated 6th October 2006 rejecting the objections.

6. We have heard Mr.Mistri in support of this Petition and Mr.Sharma for the respondents. A detailed reply has been filed so also the rejoinder. Rule is issued on the Petition and the matter is heard forthwith.

7. Mr.Mistri, learned Counsel appearing for the petitioner, submitted that it was a clear case of change of opinion on the part of the 1st respondent-Income Tax Officer. The petitioner had made a full and correct disclosure of its income and claimed depreciation which was claimable on know-how, franchises, business and commercial rights under Section 32(1)(ii) of the Income Tax Act. That depreciation has been granted by the Assessing Officer and a regular assessment order was passed under Section 143(3). Thereafter when the audit objections were raised, in fact, the 1st respondent had pointed out to the auditor that there was no need to have a re-assessment. The letter written by the 1st respondent to the Principal Director of Audit is dated 23rd

September 2005. It is specifically referred in paragraph 7 of the rejoinder and that the petitioner came to know about it after taking inspection. We were shown that letter from the file of the respondents. Mr.Mistri, therefore, submits that firstly under Section 147 of the Income Tax Act, it is necessary that the Assessing Officer must have his reason to believe that the income has escaped assessment. This means that it must be the opinion of the Assessing Officer himself since Section 147 begins with the phrase "If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment"

8. In this behalf, Mr.Mistri, learned Counsel appearing for the petitioner, has relied upon a judgment of the learned Single Judge of the Patna High Court in the case of **Sheo Narain Jaiswal & ors. vs. Income-tax Officer & ors.** reported in **(1989) 176 ITR 352 (Patna)** and earlier decision of a Division Bench of the Madras High Court in **CIT, Madras vs. T.R. Rajakumari** reported in **1974 (96) ITR 78**. In both these judgments, it is held that the initiation of re-assessment on the directions of superiors is bad in law and that the decision has to be of the ITO himself.

9. That apart, Mr.Mistri assailed the reasons to reopen the assessment and has pointed out that all that the reasons state is that the intangible assets will not qualify for depreciation. He submits that the same officer had taken a view that the very assets were eligible for depreciation. Even in the decision on the objections, it is no where stated as to how the assessee has not made the full and true disclosure. This being so, on the merits also, there was no reason to reopen the assessment and it amounts nothing but a change of opinion. It is pointed out that the Assessing Officer asked for the particulars of the intangible assets and they were furnished to him. Thereafter he had passed the assessment order allowing the depreciation and now obviously on the audit objection, he is reopening the assessment, though he has himself justified non-reopening thereof.

10. Mr.Sharma, learned Counsel appearing for the respondents, on the other hand, submitted that this is a case of escaping of the income and that of excessive depreciation allowance being granted. This decision of the Assessing Officer is protected under Clause (c)(iv) of Explanation 2 to

Section 147 of the Income Tax Act. Secondly, he submitted that under Explanation 4 to Section 32(1) of the Income Tax Act, the expression "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods and it will not include the kind of intangible assets on which the depreciation is sought. He lastly submitted that the decision to reopen was that of the Assessing Officer himself. It is true that he had initially objected to the reopening in reply to the Director of Audit but subsequently took his own decision and that it should not be construed as a change of opinion. He submitted that it must be kept in mind that this is going to result into a good loss of the revenue.

11. We have considered the submissions of both the Counsel. In the facts of the present case, it is quite clear that the petitioner was granted depreciation allowance on the intangible assets in the nature of know-how purchased by it. A regular assessment order was passed under Section 143(3) of the Income Tax Act. In reply to the Director of Audit, the Assessing Officer had opposed the reopening. In spite of the same, he has reopened the assessment. It is, therefore, difficult to

say that he has formed his own opinion that the income has escaped assessment.

12. Secondly, it is not at all a case that the petitioner has not disclosed anything to the respondents. The petitioner has given full particulars of the intangible assets and it has maintained that it is eligible for the depreciation. Mr. Mistri has submitted that, in fact, Section 32(1)(i)(ii) of the Income Tax Act permits depreciation in respect of know-how, franchises, copyrights, any other business or commercial rights which are intangible assets. We may not express our opinion on the merits of the claim of the petitioner. But the fact remains that as far as this Assessment Year 2003-04 is concerned, the stand taken by the petitioner was accepted by the respondents on merits and even after disagreeing with the audit objection, as a second thought on the objections from the auditors, he has reopened the assessment. In the reasons to reopen as well as in the decision on the objections, he has nowhere stated as to how the income has escaped assessment. In our view, reopening of the assessment without any basis and merely a change of opinion is not permissible while exercising the powers under Section 147 read

with Section 148 of the Income Tax Act.

13. For the aforesaid reasons, we have no option but to allow this Petition. Petition is allowed in terms of prayer (a), whereby the aforesaid Notice dated 2nd March 2006 issued under Section 148 of the Income Tax Act, the Notice dated 6th June 2006 issued under Section 142(1) and the decision on the objections dated 6th October 2006 shall get quashed.

14. Rule is made absolute accordingly. No order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)